Filed 3/30/10 Taylor v. County of Tulare CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

JAMES TAYLOR,

Plaintiff and Appellant,

v.

COUNTY OF TULARE,

Defendant and Respondent.

F056588

(Super. Ct. No. VCU204498)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Patrick J. O'Hara, Judge.

Faunce, Singer, Oatman & Woodson, Edward L. Faunce and Larry J. Roberts for Plaintiff and Appellant.

Kathleen Bales-Lange, County Counsel, and Judy Chapman, Deputy County Counsel, for Defendant and Respondent.

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James Taylor appeals the denial of his petition for writ of mandate seeking an order directing the County of Tulare (County) to reinstate him as an employee on the active payroll and pay him lost wages and benefits.

The trial court rejected the three legal theories presented by Taylor. First, the court determined that County had not "dismissed" Taylor "for disability" for purposes of Government Code section 31725[1] and, therefore, was not obligated to reinstate Taylor. Second, the court determined County did not separate Taylor from his job in violation of section 31721. Third, the court determined County did not violate Taylor's constitutional right to due process by failing to provide him with a predeprivation hearing because there was no deprivation.

We conclude the trial court's findings of fact are supported by substantial evidence and that it correctly applied the law to the facts of this case. Therefore, the judgment will be affirmed.

FACTS[2]

Taylor was hired by County as a Construction Maintenance Worker I on January 15, 1991. In 1994, Taylor became involved in a dispute with a coworker. Taylor contended that the stress caused by this dispute contributed to his developing a duodenal ulcer in 1995.

In January 1996, Taylor began a leave of absence that lasted until May 15, 1996. Taylor asserted that, after returning, he began to experience frequent vomiting. He left work again after July 2, 1996.

County's public works department sent Taylor a letter dated July 16, 1996, that stated his "vacation, sick and CTO balances were exhausted as of 7/10/96 so you are currently 'absent without pay'." The letter informed Taylor that, if his "medical needs

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[1]All unlabeled statutory references are to the Government Code.

[2]The facts stated are all of the facts set forth in our opinion in *Taylor v. County of Tulare* (June 14, 2007, F047806) (nonpub. opn.) [2007 Cal.App.Unpub. LEXIS 4774; 2007 WL 1705359], supplemented with (1) a description of County's March 28, 1997, letter to Taylor and his response and (2) a reference to the decision of a Social Security Administration administrative law judge that Taylor had been disabled within the meaning of the Social Security Act since January 16, 1996.

still require you to be off work, you must submit to your supervisor a fully completed leave of absence request form with all the necessary information from your doctor."

On August 2, 1996, Taylor filed a claim for workers' compensation based on gastritis and stress.[3]

Since mid-1996, controversy has surrounded Taylor's medical condition, its permanence, and his ability to work with restrictions. The doctors who examined him had conflicting opinions on these issues.

On March 28, 1997, an assistant public works director sent Taylor a letter stating (1) his status needed to be updated, (2) his most recent request for a leave of absence had expired on October 31, 1996, (3) he presently was absent without leave, (4) the maximum length of a medical leave of absence was 12 months, and (5) his condition was viewed as non-industrial related because the workers' compensation unit had denied his claim.

The letter stated Taylor needed to take certain action within the next two weeks. The first alternative identified in the letter stated that, if Taylor's condition had improved, he could return to work with partial or no restrictions. Under this option, Taylor would need to provide a doctor's release. The letter also requested a physical assessment from a doctor as to the kinds of activities that Taylor could perform.

Alternatively, the letter stated, Taylor could request a current medical leave of absence if his medical condition still prohibited him from returning to work. The letter indicated that any such request should outline his doctor's prognosis regarding when he could be expected to return to work. Also, Taylor was advised that the failure to obtain an approved leave of absence could be cause for disciplinary action.

Taylor responded to the letter by submitting an April 8, 1997, request for a medical leave of absence, part of which was completed by his treating physician. The physician diagnosed Taylor's condition as severe gastritis and chest pain from stress at

[3]The workers' compensation case concerning whether Taylor was suffering from a work-related injury was settled on February 10, 2000.

work and stated his worksite recreated incapacitating symptoms. The physician created an ambiguity by answering "no" to the question: "*When* will employee be able to return to work?" (Italics added.) After the item asking if continuing treatment would be required and for how long, the physician wrote: "Indefinite. Patient's condition unchanged and [word crossed out] since letter dated 11 Oct 96 Patient can never go back to this work again."[4] Lastly, item 5 of the form asked: "When employee returns to work will there be any restrictions on work activities in any way? If so, in what manner?" The handwritten response stated: "No Heavy equipment operation. No chemical exposure. OK for patching and signing work."

County sought to clarify the responses to the questions on the leave of absence request form and obtain an assessment of Taylor's physical abilities. It sent two letters in May 1997 to Taylor's physician requesting a clarification, but received no response.

On July 28, 1998, Taylor filed an application with County's board of retirement for a service-connected disability retirement based on permanent disability from knees with severe arthritis, severe diarrhea attacks, cramps, chest pain, gastritis, high blood pressure, vomiting, stress, and hearing loss.

In a proposed decision dated January 29, 2000, a referee recommended to the board of retirement that Taylor's application be denied. The referee's recommendation was approved by the board of retirement on May 17, 2000.

Taylor challenged the board of retirement's decision to deny his application for a disability retirement by filing a petition for writ of mandate in superior court.

In February 2002, the superior court denied his petition and stated that an "independent review of the evidence establishes that the record supports the

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[4]We note that Taylor's brief quotes this handwritten response differently. He asserts "his physician flatly told the County that he could 'never go back to work again.'" Taylor's quote omits the word "this" from before the word "work."

administrative hearing officer's determination that Taylor is not *permanently* incapacitated from performing his job."

In response to the denial of his petition for writ of mandate directing the board to award him a disability retirement, Taylor demanded on April 29, 2002, to be reinstated to County's payroll.

In a letter to Taylor dated July 19, 2002, County acknowledged the board of retirement's decision that he was not disabled and directed him to return to work on July 31, 2002. The letter requested "information from you and your doctor regarding any present work restrictions …." Taylor also was advised that County had "submitted your request for back pay, benefits, seniority, and retirement contributions to legal counsel for review and advice."

Counsel for Taylor and counsel for County communicated with one another before July 31, 2002, and Taylor did not return on that day. The position taken by Taylor and his counsel during August 2002 was that Taylor should be reinstated to active payroll and retroactively paid salary and benefits and that County should conduct its own fitness-for-duty examination. Taylor believed the results of that examination would be that he was unable to perform his duties and, as a result, County was obligated under section 31721, subdivision (a) to file its own application for disability retirement on his behalf.

Further communications between the parties resolved little, and on September 5, 2002, County sent Taylor a letter stating that he was required to submit a leave of absence request form.

Taylor submitted the leave of absence request form and his attorney advised County that Taylor had done so out of compulsion. The attorney's letter also identified the following factual dispute: Taylor "reported to work and was told by his Departmental and County representatives to go home because they had no work for him in his condition. You[, counsel for County,] advised me that you got a different story."

Further disputes regarding Taylor's rights and obligations to return to work continued and were not resolved.

PROCEEDINGS

In March 2003, Taylor began this litigation by filing a petition for peremptory writ of mandamus pursuant to Code of Civil Procedure section 1085. Two years later, the trial court granted the petition, awarded Taylor lost pay and benefits, and ordered County to restore Taylor to active payroll status "continuing indefinitely, whether or not [he] is willing and/or able to return to work."

Two years and three months after the trial court's judgment was filed, we reversed and remanded for further proceedings. (*Taylor v. County of Tulare*, *supra*, F047806.) We felt remand was necessary so the trial court, sitting as a trier of fact, could apply the new interpretation of section 31725 adopted by the California Supreme Court in *Stephens v. County of Tulare* (2006) 38 Cal.4th 793 (*Stephens*).

Pursuant to our remand order, the trial court conducted a hearing on Taylor's petition in May 2008. About a week later, the court issued a tentative statement of decision denying the petition. After amending its tentative decision to address a point raised by Taylor, the court adopted a proposed statement of decision and a proposed judgment submitted by counsel for County.

The trial court concluded that Taylor had failed to prove that he was dismissed in 1996 or at any time thereafter or that he had been separated from his employment. The court explicitly concluded that the County's March 28, 1997, letter did not dismiss Taylor, either expressly or impliedly, and made the following findings of fact:

> "All of the evidence shows that [Taylor], just like *Stephens*, has been free to return to work at any time that he felt that he could perform the duties of his job, and/or present what restrictions were necessary to accommodate him. The County inquired of Taylor and his doctor as to what his condition was and any restrictions. Neither Taylor nor his doctor replied. [In 2002, a]fter his disability retirement application was denied, [Taylor] was invited back to work, the County set up meetings to discuss his return to work, and [Taylor] frustrated efforts by the County to engage in the interactive

process. [Taylor] cannot refuse to interact in good faith with the County for accommodation and then voluntarily remain off work, and allege the County has dismissed him."

Taylor received a notice of entry of judgment in September 2008 and subsequently filed a timely notice of appeal.

DISCUSSION

I. Standard of Review

Appellate courts independently review questions of law. (*Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 801.) "Issues of statutory construction as well as the application of that construction to a particular set of facts are questions of law." (*Coburn v. Sievert* (2005) 133 Cal.App.4th 1483, 1492.)

In contrast, appellate courts generally apply the deferential substantial evidence standard to a trial court's findings on questions of fact. (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429.) Under this standard of review, evidence is "substantial" if it is "of 'ponderable legal significance,' 'reasonable in nature, credible, and of solid value' …. [Citations.]" (*Grappo v. Coventry Financial Corp.* (1991) 235 Cal.App.3d 496, 507.)

II. Section 31725 and Dismissals for Disability

The County Employees Retirement Law of 1937 (§ 31450 et seq.) includes provisions concerning disability retirement. Those provisions include section 31725, which protects county employees from being dismissed from their job because of a permanent disability:

> "Permanent incapacity for the performance of duty shall in all cases be determined by the [county] board [of retirement]. [¶] If the medical examination and other available information do not show to the satisfaction of the board that the member is incapacitated physically or mentally for the performance of his duties in the service and the member's application [for a disability retirement] is denied on this ground the board shall give notice of such denial to the employer. The employer may obtain judicial review of such action of the board by filing a petition for a writ of mandate in accordance with the Code of Civil Procedure or by joining or intervening in

> such action filed by the member within 30 days of the mailing of such notice. If such petition is not filed or the court enters judgment denying the writ, whether on the petition of the employer or the member, and *the employer has dismissed the member for disability[,] the employer shall reinstate the member to his employment effective as of the day following the effective date of the dismissal*." (Italics added.)

The California Supreme Court summarized the requirements of section 31725 as follows:

> "[I]f (1) the county board of retirement rules an applicant/employee is not permanently disabled so as to be entitled to a disability retirement, (2) the board denies the employee's disability retirement application on that ground, and (3) no appeal is filed or all appeals are final, then the applicant/employee is entitled to reinstatement to his or her prior position if (4) the employing county has previously 'dismissed' the employee 'for disability.' (§ 31725.)" (*Stephens, supra*, 38 Cal.4th at p. 801.)

The parties agree that Taylor applied for a disability retirement, the county board of retirement denied his application on the ground he was not permanently disabled, Taylor challenged the board's determination by filing a petition for writ of mandate, the trial court entered judgment denying Taylor the writ, and that judgment became final. Consequently, the first three conditions were satisfied. The remaining question is whether County "dismissed [Taylor] for disability" for purposes of section 31725.

In *Stephens*, the court concluded that the term "dismissed" meant "the employment relationship, at the employer's election, has ended." (*Stephens*, *supra*, 38 Cal.4th at p. 802.) Rephrasing its interpretation, the court stated "a dismissal as contemplated by section 31725 requires an employer action that results in severance of the employment relationship." (*Ibid*.)

We reiterate the following conclusions of law from our previous opinion in this litigation. First, the language chosen by our Supreme Court means that the requisite elements of a "dismissal" are (a) employer action (b) that causes (c) the employment relationship to end.

Second, the employer's intent or state of mind is not among the essential elements for establishing a dismissal occurred, but evidence of the employer's intent is relevant to establishing the essential elements.[5]

Third, a two-part test is applied to determine whether the employment relationship has ended—namely, when "the relationship has ended, (1) the employer no longer has an obligation to pay salary or other forms of compensation, and (2) the employee has no basis for expectation that a position exists, will be kept open, or will be made available upon the employee's offer to return to work." (*Stephens, supra,* 38 Cal.4th at p. 802.) The phrase "no basis for expectation" in the test's second part means the employee's understanding or expectation is judged by what was objectively reasonable at the time based on the surrounding circumstances, not the employee's subjective state of mind.

III. Theory of Dismissal in 1997

A. Contentions of the Parties

Taylor's first theory of dismissal[6] revolves around County's March 28, 1997, letter and subsequent events. Taylor appears to contend a dismissal occurred when County concluded in March 1997 that he could no longer do his job and, after reaching this conclusion, County failed in its statutory duty to apply for disability retirement for him.

In response, County contends Taylor's theory lacks merit because substantial evidence supports the trial court's finding that Taylor had not been dismissed before he filed an application for disability retirement in July 1998.

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[5]We recognize that other courts have phrased their analysis in terms that give a larger role to the employer's intent. (See *Kelly v. County of Los Angeles* (2006) 141 Cal.App.4th 910.)

[6]First, at least, from a chronological perspective.

B. Analysis

Our analysis of Taylor's theory that he was dismissed in 1997 begins with an examination of the employer action and proceeds to a determination whether that action caused the employment relationship to end.

1. Employer action

Taylor's theory of employer action is based on the factual assertions that County concluded he could no longer do his job and then undertook action that goaded or pushed Taylor into submitting another request for leave of absence. Taylor contends County's proper course of action after concluding he could no longer do his job was for it to apply for disability retirement for him.

First, we cannot accept Taylor's factual assertion that County concluded in March 1997 that he could no longer do his job. Taylor's reliance on language in the March 28, 1997, letter—"you can no longer do your job"—is misplaced because that language must be placed in context. The third paragraph of that letter begins:

> "We need to update your status. In light of your doctor's [October 11, 1996,] letter, it appears that you can no longer do your job. However, it is not clear whether your condition is permanent and stable."

The March 28, 1997, letter clearly indicates that County wanted more information about Taylor's current condition and had not reached a final conclusion. The letter states that if his condition has improved and he has a doctor's release, he can return to work with partial or no restrictions. Alternatively, it states that if his medical condition still prohibits him from returning to work, he will need to request a current medical leave of absence. In addition, subsequent letters by County to Taylor's physician sought clarification of Taylor's condition but went unanswered.

Based on the evidence in the record, we reject the factual assertion that in 1997 County concluded Taylor was unable to do his job. Under the applicable standard of review, we must indulge all intendments favoring the ruling below and must infer every finding of fact supporting the judgment, provided that the finding is supported by

substantial evidence. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134.) Applying this rule of appellate review, we infer the trial court found County's inquiries were sincere expressions of uncertainty as to (1) Taylor's condition and (2) whether any limitations on his ability to work could be accommodated.[7] These implied findings are justified because substantial evidence, which includes County's letters, provides a reasonable basis for the implied findings and they are favorable to the trial court's decision.

Second, County's request for Taylor to complete another request for leave of absence form was not so coercive as to render Taylor's submission of the form an involuntary act. County had the right to know Taylor's contention regarding his current condition, and the leave of absence form was an appropriate mechanism for obtaining that information.

In summary, the relevant "employer action" for purposes of Taylor's theory that he was dismissed in 1997 are County's attempts to obtain more information about his medical condition and County's direction that he was required to file a leave of absence request if he was unable to return to work.

2. End of the employment relationship

It is undisputed that County's letters and other actions in 1997 did not formally dismiss Taylor from his status as a County employee. Consequently, the question is

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[7]The County Employees Retirement Law of 1937 is not the only statute that defines a county's obligations to a disabled employee. Under the Fair Employment and Housing Act (§ 12900 et seq.), a county can be sued for (a) discriminating against a disabled employee, (b) failing to reasonably accommodate an employee's disability, and (c) failing to engage in the required interactive process to determine the accommodations reasonably necessary to accommodate the employee's medical condition. (See *Jenkins v. County of Riverside* (2006) 138 Cal.App.4th 593, 603 [listing elements to prima facie case of disability discrimination]; *Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1192 [§ 12940 imposes a duty to make reasonable accommodations for a known disability and a duty to engage in interactive process to determine effective reasonable accommodations].)

whether County's action had the same effect as a formal dismissal—that is, did it end the employment relationship. (*Stephens*, *supra*, 38 Cal.4th at p. 807.)

The trial court concluded that County's employment relationship with Taylor was not ended in 1997 because (a) County continued to provide him health benefits, (b) County tried to determine Taylor's condition and his ability to perform work with restrictions (see fn. 7, *ante*), and (c) County indicated that Taylor could return to work if he was willing and able to do so. These underlying findings of fact are supported by substantial evidence and justify the trial court's inference of ultimate fact—namely, that Taylor was not impliedly dismissed from his job in 1997.

The foregoing conclusion is compatible with the interpretation and application of *Stephens* in *Kelly v. County of Los Angeles*, *supra*, 141 Cal.App.4th 910. In that case, the court stated:

> "Nor is a dismissal established merely by the fact that Kelly was taken off the regular payroll. As the Supreme Court has made clear, the term 'dismissed' does not simply mean the absence of a salary. A person could be on unpaid leave, perhaps as a reasonable accommodation under the Fair Employment and Housing Act for a significant period of time, but that alone is not sufficient to find a termination." (*Id*. at p. 924.)

Under the circumstances of this case, we cannot find as a matter of law that (a) County no longer had an obligation to pay any form of compensation to Taylor *and* (b) Taylor had no basis for expectation that a position would be made available upon his offer to return to work. (*Stephens*, *supra*, 38 Cal.4th at p. 802.)
Therefore, the trial court did not err in determining that the employment relationship between County and Taylor did not end in 1997.

IV. Theory of Dismissal After Denial of Retirement Disability

In April 2002, after losing his lawsuit challenging the retirement board's denial of a disability retirement, Taylor demanded reinstatement to County's payroll. In July 2002, County directed Taylor to return to work on July 31, 2002, requested information

regarding any present work restrictions, and advised him that legal counsel was reviewing his request for back pay and benefits.

Taylor attended a meeting with County personnel on August 15, 2002. The parties dispute what occurred at this meeting. Ultimately, Taylor did not return to work, was not restored to paid status, and submitted (under protest) a request for a leave of absence.

A. Contentions of the Parties

Taylor contends that he should be restored to paid status retroactive to the date his demand for reinstatement was denied. Taylor views the law as follows: "Not only can the failure to reinstate an employee out on voluntary medical leave following a denial of his application for disability retirement constitute a dismissal, it **does** constitute a dismissal."

In contrast, County contends that reinstatement to the payroll is conditioned upon the employee's willingness to work and, therefore, not all failures to reinstate an employee to the payroll constitute dismissals for purposes of section 31725. County interprets the statute and related case law to mean:

> "[I]f the County denies an employee, who has been judicially found able to perform the duties of his job, the opportunity to work, or if the County makes the conditions of return so intolerable that the County is 'effectively denying' the employee the opportunity to work, the employee has been 'dismissed' and the County will be required to continue to pay the salary and benefits the employee would have received but for the County's wrongful act in denying the employee his job."

Taylor expressly disagrees with this interpretation, arguing that "the employer's obligation under [section 31725] goes beyond merely allowing the employee to return to work and extends to the reinstatement of the employee to 'paid status'."

B. Interpretation of *Stephens*

Taylor's contention that he was dismissed for purposes of section 31725 as a result of County's failure to restore him to paid status following the denial of his application for

disability retirement is based on the following statement by the California Supreme Court:

> "*Phillips*[*v. County of Fresno* (1990) 225 Cal.App.3d 1240] does not hold that an employee's voluntary decision to take leave time is the equivalent under section 31725 of being dismissed for disability. It holds only that a failure to *reinstate* an employee, following a period of permissive, voluntary leave, can constitute a 'dismissal' despite the absence of a formal termination or firing." (*Stephens*, *supra,* 38 Cal.4th at p. 808.)

We interpret our high court's use of the word "can" to mean that some failures to reinstate an employee are dismissals and other failures are not. The definitions of "can" in Webster's Third New International Dictionary (1986) include "may perhaps **:** may possibly." (*Id*. at p. 323.) Consequently, we reject Taylor's interpretation that the failure to reinstate an employee out on voluntary medical leave following the denial of his application for disability retirement necessarily constitutes a dismissal.

Furthermore, we interpret *Stephens* to mean that whether an employee has been dismissed for disability for purposes of section 31725 is a question of fact. When discussing *Leili v. County of Los Angeles* (1983) 148 Cal.App.3d 985, the California Supreme Court accepted the determination that the employer's action "removing the employee from active duty *in fact* constituted a dismissal." (*Stephens*, *supra*, 38 Cal.4th at p. 807, italics added.) The use of the phrase "in fact" here and elsewhere in *Stephens* supports the conclusion that whether an employer's action is *in effect* a dismissal presents a question of fact.

Like other questions of fact, it can be decided as a matter of law when the relevant facts are not in dispute or if reasonable minds can come to only one conclusion. (See *Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1347 [existence of dangerous condition is question of fact that can be decided as a matter of law if reasonable minds can come to only one conclusion]; *Feduniak v. California Coastal Com.* (2007) 148 Cal.App.4th 1346, 1381 [laches, a question of fact, may be decided as a matter of law where the relevant facts are undisputed].)

Accordingly, we next consider the question whether County's failure to restore Taylor to paid status and its other actions after the retirement board's decision became final constitutes a dismissal *as a matter of law*. To answer this question, we will apply the three essential elements of a dismissal to the factual findings that are supported by substantial evidence.

C. Application of Essential Elements of a Dismissal

1. Employer action

After the board of retirement decided Taylor was not permanently disabled, County sent Taylor a letter directing him to return to work on July 31, 2002, and requesting him to provide information regarding any present work restrictions. It is important to note that this action by County was consistent with the board of retirement's decision.

Taylor's attorney responded to the letter by objecting to direct communication between County and Taylor, stating Taylor already had communicated his intent to return to work, stating that various issues (back pay, job assignment, work restrictions) should be resolved between legal counsel, and indicating his understanding that County had agreed to suspend Taylor's reporting date until the lawyers had discussed and decided how to handle reinstatement.

An August 6, 2002, letter from County's attorney acknowledged that the retirement board's decision meant Taylor was deemed fit and entitled to return to work. The letter also advised that County was "ready and willing to accept Mr. Taylor back to work and, if necessary make any reasonable accommodation. However, the Department must be able to communicate with Mr. Taylor in order to determine the appropriate parameters for his return to work as it has been some time since he last worked."

Taylor attended a meeting with County on August 15, 2002. Taylor's attorney could not be present and requested that the meeting be recorded. The request was refused. After the meeting, County personnel and Taylor had different versions of what

happened, precisely the problem Taylor's attorney had attempted to avoid by recording the meeting. In County's version, Taylor was advised that County was ready, willing and able to accommodate the work restrictions contained in a report from Dr. Thomas Leonard. Taylor responded by saying he was unable to return to work and presented notes from Drs. William Koble and Alvin Au that included their recommendations that Taylor not return to work. After hearing Taylor's statement and reviewing the notes, a County representative told Taylor that he could not return to work on that date and stated County would need to seek clarification from Taylor's doctors.

On September 5, 2002, County sent Taylor a letter referencing his doctors' notes and stating that (1) if he was unable to return to work he should submit a leave of absence request form and (2) without an approved leave of absence "your status becomes one of unauthorized leave." Taylor submitted the leave of absence request form under protest.

The factual question regarding what happened at the August 15th meeting involves a question of credibility—a question the trial court resolved in favor of County. (See *Bradley v. Perrodin* (2003) 106 Cal.App.4th 1153, 1166 [credibility determinations are the exclusive province of the trial court].) Specifically, the court stated:

> "After his disability retirement application was denied, [Taylor] was invited back to work, the County set up meetings to discuss his return to work, and [Taylor] frustrated efforts by the County to engage in the interactive process. [Taylor] cannot refuse to interact in good faith with the County for accommodation and then voluntarily remain off work, and allege the County has dismissed him."

In light of the trial court's findings, the primary actions of the County relevant to determining whether County caused its employment relationship with Taylor to end are (1) its letter directing Taylor to report for work, (2) its statements at the August 15th meeting that Taylor could not return to work on that date because of his statement that he was unable to work and the notes from his doctors recommending that he not return to work, (3) County's statement that it would need to seek clarification from Taylor's

doctors and (4) its subsequent directions to Taylor to submit a leave of absence request form to avoid being regarded as on unauthorized leave.

2. End of the employment relationship

It is undisputed that Taylor was not formally dismissed in 2002. Therefore, we consider whether the previously described actions by County were, as a matter of law, functionally equivalent to a termination. (*Stephens, supra,* 38 Cal.4th at p. 809.)

Under *Stephens,* the employment relationship has ended only if "the employee has no basis for expectation that a position exists, will be kept open, or will be made available upon the employee's offer to return to work." (*Stephens, supra,* 38 Cal.4th at p. 802.) County's actions were consistent with an employer trying to determine whether an employee has a temporary or permanent disability. The note of Dr. Au that Taylor presented at the August 15th meeting stated: "I do not recommend that he return to work at this time." The use of the prepositional phrase "at this time" suggests that Taylor's condition may be temporary and that he would be able to return to work at a later time. Consequently, County's action in treating Taylor as temporarily disabled and directing him to submit a leave of absence request form cannot be regarded as eliminating any basis for the expectation that a position would be kept open or made available to him upon his offer to return to work.

This conclusion is consistent with our Supreme Court's statement that it had found no authority "holding that an employer functionally or effectively terminates an employee by telling the employee to go out on sick leave until his or her medical condition abates sufficiently to enable return to the job." (*Stephens, supra,* 38 Cal.4th at p. 809.) Similarly, County's actions, which included directing Taylor to complete a leave of absence request form, are not as a matter of law the functional equivalent of a termination.

In summary, the trial court's finding that "there is no basis for Taylor's expectation that he was dismissed or separated from his employment" is supported by

substantial evidence, which includes his continued receipt of health benefits from County and County's statement that he can return to work when he is willing to do so. Therefore, Taylor has not demonstrated the trial court erred when it concluded the protections of section 31725 had not been triggered.

V. Separation and Section 31721

Section 31721, subdivision (a) identifies the persons who may apply for a disability retirement[8] for a county employee and also states that "an employer may not separate because of disability a member otherwise eligible to retire for disability but shall apply for disability retirement of any eligible member believed to be disabled …."

Taylor contends that the verb "separate" is not the same as dismiss and should be interpreted by this court to mean "to set or keep apart **:** DETACH." (Webster's 3d New Internat. Dict., *supra*, at p. 2069.) Applying this dictionary definition, Taylor interprets section 31720 to prohibit action by the employer that parts or detaches the employee from the payroll even if it does not sever the employment relationship.

Another dictionary definition of "separate"—a definition more closely related to the employment context—provides: "to sever contractual relations with **:** DISCHARGE <he was *separated* from the service with the rank of captain –E.J. Kahn> <more than 100 employees have been *separated* from the firm in the past six months>." (Webster's 3d New Internat. Dict., *supra*, at p. 2069.)

First, if the term separate means to dismiss or discharge, then County has not violated section 31721 for the same reason that it did not dismiss Taylor for purposes of section 31725.

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[8]Permanently incapacitated employees may qualify for disability retirement that is either service connected or nonservice connected. (§ 31720.) To be eligible for a nonservice-connected disability retirement, the employee must have completed five years of service. (§ 31720, subd. (b).)

Second, if we adopt a variation of Taylor's interpretation and construe "separate" to mean wrongfully remove from the paid status because of permanent disability, the facts of this case do not justify the conclusion that County separated Taylor from his job in violation of section 31721.

The retirement board's 2002 decision placed County in the position of trying to determine which of the following accurately described Taylor's situation: (1) the retirement board had erred because Taylor truly was permanently disabled; (2) the retirement board was correct because Taylor only was temporarily disabled; or (3) the retirement board was correct because Taylor could perform the duties of his job.

County accepted the retirement board's decision and, consistent with that decision, stated Taylor could return to his job or provide information about his present medical condition if he could not return to work. In response, Taylor stated he could not return to work and presented doctors' recommendations that did not indicate whether they believed Taylor was permanently or temporarily disabled. In the face of this uncertainty, Taylor did not cooperate with County in its attempts to determine his limitations and how long they would last. Based on these facts, County's action in directing Taylor to submit a leave of absence request form cannot be characterized as wrongful. Furthermore, the trial court did not find that County pursued its course of action as a pretext for putting Taylor on unpaid leave instead of paying a disability retirement.

Third, we reject Taylor's interpretation and application of section 31721 to the extent that he contends County violated the statute by not returning him to the payroll once the retirement board determined he was not permanently disabled. This interpretation and application of section 31721 would eliminate the distinction between permanent and temporary disability, and sections 31721 and 31725 clearly were written to apply only to permanently disabled employees.

In addition to concluding that County did not separate Taylor from his job in 2002, we also conclude it did not separate him from his job in 1997. The protections of section

31721 would not have been triggered at that time because Taylor was not an employee "otherwise eligible to retire for disability." The retirement board's subsequent rejection of his application for disability retirement demonstrates as much.

In summary, Taylor failed to prove that County's action separated him from the payroll in violation of section 31721.

VI. Due Process Right to a Predeprivation Hearing

Taylor contends that because he was not given a predeprivation hearing, his employment was taken without due process of law. Specifically, Taylor contends he should have been afforded some kind of hearing before he was separated from his employment and that hearing should have given him a meaningful opportunity to oppose his involuntary removal from the payroll.

Taylor relies on *Coleman v. Department of Personnel Administration* (1991) 52 Cal.3d 1102 to support his position. "The interest of a permanent or tenured civil servant in the continuation of his or her employment is a vested property interest qualifying for protection under the Constitution's due process guarantee." (*Id*. at p. 1109.)

The trial court rejected Taylor's due process argument, stating: "There was no pre-deprivation hearing because there was no deprivation. Taylor has never been terminated and the fact that he is still receiving health benefits shows that his belief [otherwise] is not objectively reasonable."

We agree with the trial court that County has not deprived Taylor of his vested right to employment. Taylor's status as an employee is demonstrated by the fact that he continues to receive health benefits from County and County has stated he can return to work when he is willing and able.

Taylor also appears to argue that he has a vested property right to be paid even when not working and out on a leave of absence.

> "Property interests that are subject to due process protections are not created by the federal Constitution. 'Rather, they are created, and their dimensions are defined by existing rules or understandings that stem from

> an independent source such as state law ….' [Citations.]" (*Coleman v. Department of Personnel Administration, supra*, 52 Cal.3d at p. 1112.)

Based on the California Supreme Court's narrow interpretation of section 31725 adopted in *Stephens*, state law can no longer be said to provide Taylor with a right (vested property interest or otherwise) to receive full pay without working and without cooperating in the interactive process. Therefore, we reject Taylor's contention regarding the scope of his vested property interest in remaining on the payroll.

In addition, even though Taylor's argument does not identify the particular time the alleged deprivation occurred, we will consider a few specific situations.

First, on July 2, 1996, Taylor left work because he was vomiting. Two weeks later, County's public works department sent him a letter that stated his "vacation, sick and CTO balances were exhausted as of 7/10/96 so you are currently 'absent without pay'." The letter also advised Taylor that, if his medical condition required him to be off work, he must submit a completed leave of absence request form. If Taylor's due process argument is interpreted as an assertion that he had a vested property interest in continuing to collect a full salary after he exhausted his paid leave in July 1996, we reject this argument. Taylor has presented no authority to support the proposition that treating an employee with a medical condition as being on unpaid leave after the employee has exhausted paid leave is a deprivation that requires a due process hearing.

Second, in March 1997, County sent Taylor a letter stating he needed to update his status to be able to continue on an authorized leave of absence. This letter and Taylor's response continued the status quo and did not result in change, much less the deprivation of a vested right to receive full pay.

Third, in August 2002, Taylor met with County personnel and told them he would not return to work and presented doctors' notes recommending that he not return to work. County personnel responded by saying he could not go back to work and that they would need to clarify Taylor's medical condition with his doctors. To the extent that Taylor's

due process argument is interpreted to mean that an employee is entitled to a hearing after presenting a doctor's note and saying he or she will not return to work, we reject the argument. Taylor's actions at the meeting were tantamount to taking unpaid medical leave, an action that does not require a due process hearing.

Based on the foregoing, we agree with the trial court that no deprivation occurred that required a predeprivation hearing.

DISPOSITION

The judgment is affirmed. County shall recover its costs on appeal.

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DAWSON, J.

WE CONCUR:

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WISEMAN, Acting P.J.

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KANE, J.